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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SERENE G. SHAPER,
Petitioner,
v.

ROGER W. TRACY,
Tax Commissioner of Ohio,
and

BETTY MONTGOMERY,
Attorney General of Ohio,
Respondents.

Petition for a Writ of Certiorari to the Ohio Tenth Appellate District Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may, consistent with the Commerce Clause, impose its income tax on out-of-state municipal bond interest while exempting interest received from in-state municipal bond issuers.

2. Whether State courts entertaining State declaratory challenges to a State tax statute may refuse to hear such claims asserted under 42 U.S.C. § 1983.

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OPINIONS BELOW

The November 12, 1993 decision of the Court of Common Pleas, Franklin County, Ohio, case number 93CVH-11-9271, has not been officially reported and is set out in Appendix D at 13a.

The September 29, 1994 opinion of the Court of Appeals of Ohio, affirming summary judgment to the defendants is reported at 97 Ohio App.3d 760 (Ohio App. 10 Dist. 1994), and is set out in Appendix B at 2a.

The Supreme Court of Ohio's March 1, 1995 Order declining jurisdiction to hear this case is set out in Appendix A at 1a.

JURISDICTION

The Ohio Court of Appeals affirmed summary judgment on September 29, 1994. On March 1, 1995, the Supreme Court of Ohio declined jurisdiction to hear this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, provides:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. U.S.C.A. Const. Art. I § 8, cl. 3.

The Supremacy Clause of the United States Constitutions, Article VI, Clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S.C.A. Const. Art. VI, cl. 2.

42 U.S.C. § 1983 (1994) provides, in pertinent part:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ohio R.C. § 5747.01(A)(1) provides, in pertinent part:

> § 5747.01 Definitions. . .
>
> As used in this chapter:
>
> (A) "Adjusted gross income" means adjusted gross income as defined and used in the Internal Revenue Code, adjusted as follows:
>
> (1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities; . . . Ohio R.C. § 5747.01(A)(1).

Ohio R.C. § 5709.76 provides, in pertinent part:

> § 5709.76 Exemption of public obligations.
>
> (A) All of the following are exempt from taxes levied by the state and its subdivisions:
>
> (1) Public obligations;
>
> (2) Interest or interest equivalent on public obligations and on purchase obligations;
>
> (3) The transfer, and any profit made on the sale, exchange, or other disposition, of public obligations. . . . Ohio R.C. § 5709.76.

The following provisions of the **Ohio Constitution** additionally exempt certain items of specific Ohio bond interest from taxation:

Art. VIII, § 2b	Adjusted compensation for service in World War II.
Art. VIII, § 2c	Construction of state highway system.
Art. VIII, § 2d	Korean War bonus.
Art. VIII, § 2f	Authorizing bond issue to provide school classrooms, support for universities, for recreation and conservation and for state buildings.

Art. VIII, § 2g	Authorizing bond issue or other obligations for highway construction.
Art. VIII, § 2i	Capital improvement bonds.
Art. VIII, § 2j	Vietnam conflict compensation fund.
Art. VIII, § 2k	Issuance of general obligations of the state to finance local government public infrastructure capital improvements.
Art. VIII, § 21	Parks, recreation, and natural resources project capital improvements.

STATEMENT OF THE CASE

This appeal presents two pure legal issues in a Commerce Clause challenge to Ohio's discriminatory income taxation of only out-of-state municipal bond interest income, while exempting the interest on Ohio-issuer bonds.

Petitioner seeks review of the Ohio appellate court's affirmance of the trial court's grant of summary judgment to defendant state officials, and denial of plaintiff's motion for summary judgment, in its view that: (1) the negative Commerce Clause does not limit a State's discriminatory actions done to benefit its own local "public" or "sovereign" interests, as distinct from local *private* interests, and (2) state taxpayers challenging the facial constitutionality of a state income tax provision in a declaratory action permitted by state law may not assert a count under 42 U.S.C. § 1983.

The Declaratory Proceedings Below. Petitioner Serene G. Shaper, an Ohio resident owner of municipal bonds issued by out-of-Ohio municipalities, sued, under Ohio's Declaratory Action provisions, R.C. 2721.02 and 42 U.S.C. § 1983, for declaratory and injunctive relief, asserting that Ohio's discriminatory income taxation of out-of-state-sourced municipal income, while exempting interest on Ohio-issued municipal bonds, on its face violates

the Commerce Clause of the United States Constitution as pure discrimination against items in Commerce.

Petitioner moved for class certification and for summary judgment that R.C. § 5747.01(A)(1)'s discriminatory taxation scheme violates the Commerce Clause.

The defendant state officials ("defendants") cross-moved for summary judgment, asserting (1) that provision to benefit State *public*, rather than *private*, interests does not discriminate against commerce, but even so, that it is permitted by either the "market participant" exception or the notion that the Commerce Clause does not apply to limit state actions done to benefit local public (as distinct from private) interests, (2) that Ohio law should not permit petitioner to challenge the provisions by a declaratory action, and (3) that petitioner should not be permitted to pursue her action under 42 U.S.C. § 1983.

In a decision dated November 12, 1993 (Judgment entered December 7, 1993), Franklin County Common Pleas Judge Evelyn J. Stratton upheld the taxpayer's right under Ohio law to bring a declaratory action challenging a state tax provision as unconstitutional on its face without requiring her to first exhaust her administrative remedies for past tax years, but struck the § 1983 count holding that the action could not be pursued under 42 U.S.C. § 1983 in addition to her state law remedies. However the Court then granted summary judgment to the state, ruling that Ohio's discriminatory income taxation of only out-of-state municipal income is exempt from Commerce Clause scrutiny for two reasons: (1) that the discrimination is protected by the "market participant" exception (since it was imposing a tax to assist in its sales of its own bonds) and (2) that the Commerce Clause does not apply to limit state actions done to further the state's *own* interests, as distinct from Ohio private business interests. The court thus never reached the issue of class certification, finding it moot by her grant of judgment on the merits.

Appeal to the Ohio Appellate Court. The appellate court affirmed on the second substantive ground. The court held that the "market participant" exception does not apply, since the state of Ohio, in assessing taxes, acts as a market *regulator*, not a market *participant*. However, the court nonetheless affirmed, agreeing that the Commerce Clause was not intended to apply to acts of a sovereign acting for its *own* behalf, to provide the taxing state with a competitive advantage over another sovereign. In light of its holding the tax statute constitutional, it found the § 1983 issue moot.

On November 14, 1994, Petitioner filed a Notice of Appeal and Memorandum in Support of Jurisdiction with the Supreme Court of Ohio, presenting two pure questions of law: 1) the constitutionality of the Ohio income tax provision, R.C. § 5747.01(A)(1), which taxes the interest on obligations issued by non-Ohio governmental entities while exempting any interest received on obligations issued by Ohio governmental issuers, and 2) the ability of individuals to use 42 U.S.C. § 1983 as one of their causes of action in a declaratory action challenging a facially unconstitutional State tax provision.

On March 1, 1995, the Supreme Court of Ohio declined jurisdiction to hear this case and dismissed the appeal and the cross-appeal. Petitioner now seeks certiorari from this Court in order to present these two issues of extreme importance and timeliness, faced by virtually every State, and on which the State legislatures need guidance and the State courts are unable to act impartially.

A. Introduction

This appeal presents two pure questions of federal constitutional law: 1) whether Ohio's explicit discriminatory income taxation of the municipal [1] interest on

[1] For these purposes, the term "municipal" refers to all units and subdivisions of State and local governments.

bonds issued by non-Ohio governmental entities, while exempting all such interest on bonds issued by Ohio municipalities violates the Commerce Clause, or is exempt from scrutiny because the discrimination is to benefit local "public" (rather than private) interests, and 2) whether a State, especially one which already affords state court jurisdiction to a declaratory action challenging a facially unconstitutional State tax provision, may refuse to permit the challenger to assert 42 U.S.C. § 1983 as one of their causes of action.

B. Overview of Argument

Ohio's taxation of the interest on non-Ohio municipal bonds while exempting any interest received on Ohio municipal bonds is prohibited by the Commerce Clause as an explicit discrimination against items in interstate commerce. The creation of a new "sovereign interest" exemption to the Commerce Clause by the court below, permitting discrimination intended to benefit local "public" interests (as distinct from local *private* interests) conflicts with the decisions of this Court and all other reported authorities. This is an issue of enormous importance regarding the legality of state-erected barriers to the nationwide municipal bond market presented by the tax statutes in 37 states, and with respect to which any one State's legislature or courts cannot impartially eliminate, except to their competitive disadvantage.

A state court violates the Supremacy Clause in refusing to entertain counts under 42 U.S.C. § 1983 for claims already properly before it as a declaratory action against a facially invalid statute.

REASONS FOR GRANTING THE PETITION

I. A STATE'S DISCRIMINATORY INCOME TAXATION OF INTEREST ON OTHER STATES' MUNICIPAL BONDS, WHILE EXEMPTING INTEREST ON IN-STATE BONDS, IS AN EXPLICIT DISCRIMINATION AGAINST INTERSTATE COMMERCE, AND IS NOT EXEMPTED FROM COMMERCE CLAUSE SCRUTINY BECAUSE ITS PURPOSE IS TO BENEFIT THE STATE'S SOVEREIGN INTEREST, AS DISTINCT FROM LOCAL PRIVATE INTERESTS.

A. This Is An Issue Of Overwhelming Importance:

(1) to the states, because this type of statutory discrimination exists in 37 states;

(2) to the state courts and legislatures, who are themselves uncertain about its constitutionality and are unable to dispassionately adjudicate and resolve the issue; and

(3) to the nationwide municipal bond market, since it would eradicate the current state barriers to the nationwide flow of municipal bonds.

As already recognized by the major financial journals,[2] this case presents an issue of vast importance to the public, to State governments and to the municipal bond markets nationwide.

a. *This issue is of overwhelming importance to the states and their taxpayers.*

Thirty-seven other states have provisions similarly taxing municipal interest on only out-of-state bonds.[3] The

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[2] *See Articles*: Pierog, "Ohio's Tax on Out-of-State Bonds Spurs Suit That Worries Industry", *The Bond Buyer*, September 9, 1993 at Page 1, Column 8 (Appendix H at 34a); "Ohio Suit Threatens Tax Advantages of Buying Single-State Municipal Funds and In-State Bonds"; *Wall Street Journal*, December 14, 1993 at C6 (Appendix G at 31a).

[3] ALA. CODE § 40-18-14(2)(d), (f), 40-18-14(3) (1994), ARIZ. REV. STAT. ANN. § 43-1021(4) (1995), ARK. CODE ANN. § 26-51-

financial community has recognized both the local interests protected by the obvious discrimination and the national market benefits of nationwide marketability for each state's bonds.[4]

404(b)(6) (1994), CAL. REV. & TAX CODE § 17133 (1995), COLO. REV. STAT. § 39-22-104(3)(b) (1995), CONN. GEN. STAT. ANN. § 12-505(a)(4)(B) (1995), DEL. CODE ANN. tit. 30, § 1106(a)(1) (1994), GA. CODE ANN. § 48-7-27-(b)(1)(A) (1994), HAW. REV. STAT. § 235-7(a)(5), (b)(2) (1994), IDAHO CODE § 63-3022(a) (1994), KY. REV. STAT. ANN. § 141.010(10)(c) (1995), LA. REV. STAT. ANN. § 47:293(6) (1995), ME. REV. STAT. ANN. tit. 36, § 5122(1)(A) (1994), MD. ANN. TAX. GEN. CODE § 10,203, 10-204(b) (1957), MASS. GEN. LAWS ANN. ch. 62, § 1, 2(a)(1)(A) (1995), MICH. STAT. ANN. § 206.301)(a) (1995), MINN. STAT. ANN. § 290.01(19a)(1)(i) (1995), MISS. CODE ANN. § 27-7-15(4)(d) (1994), MO. ANN. STAT. § 143.121(2)(b) (1995), MONT. CODE ANN. § 15-30-111(1)(a) (1993), NEB. REV. STAT. § 77-2716(1)(a), (b), (c) (1994), N.H. REV. STAT. ANN. § 77:4(1) (1993), N.J. REV. STAT. § 54A:6-14 (1995), N.M. STAT. ANN. § 7-2-2(V) (1994), N.Y. TAX LAW § 612(b)(1) (1995), N.C. GEN. STAT. ANN. § 105-134.6(c)(1) (1994), N.D. CENT. CODE ANN. § 57-38-01.2(1)(g) (1993), OHIO REV. CODE ANN. § 5747.01(A)(1) (1991), OKLA. STAT. ANN. tit. 68, § 2358(A)(1) (1995), OR. REV. STAT. ANN. § 316.680(2)(a) (1994), PA. CONST. STAT. ANN. tit. 72, § 7303(a)(3), (6) (1995), R.I. GEN. LAWS § 44-30-12(b)(1) (1994), S.C. CODE. ANN. § 12-7-430(b)(1) (1993), TENN. CODE ANN. § 67-2-104(e) (1994), VT. STAT. ANN. tit. 32, § 5811(1) (1994), VA. CODE ANN. § 58.1-322(B)(1) (1994), W. VA. CODE ANN. § 11-21-12(b)(1) (1994).

Based just on this discriminatory tax treatment, there are literally trillions of dollars invested in in-state municipal bonds and single-state municipal bond funds marketed to residents of the tax-discriminatory states. *Fund Directions: Vital News for Informed Trustees and Directors*, Volume Three, Number One at 1, January 1994.

[4] *See e.g.*, Thomas T. Vogel, Jr., *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, The Wall Street Journal, December 14, 1993 at C19. Richard Lehmann, president of the Bond Investors Association, noted, "[s]uch taxing practices give some states a certain advantage in the municipal-bond market at the expense of other states. States with low taxes and a small population, for example, see the demand for their bonds weakened when larger states with higher taxes levy taxes on the

Nonetheless, a fair resolution of this issue is impossible, except by this Court. The Eleventh Amendment's underpinnings require that this case (and any others elsewhere) be initiated in the State courts. But each State's courts are effectively bound to uphold the discrimination, since finding their own statutory discrimination invalid, puts their State at a competitive disadvantage with the other discriminating states,[5] over whose tax provisions they have no jurisdiction.[6]

b. *Major uncertainty over the issue concerns the state legislatures.*

Explicitly due to concern about this issue in this case,[7] legislation has been proposed in at least one other State (Minnesota) to anticipate the result of this case by eliminating its own tax exemption for its state and local bonds, joining the five states that already tax interest income on most of their own bonds—Illinois, Iowa, Kansas, Oklahoma and Wisconsin.[8]

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income from the smaller states' bond issues. A legal precedent that prevented states from taxing the income from municipal bonds of other states could help boost demand for such low tax states . . . It may be good for the municipal market because it could improve the liquidity." (Appendix G at 32a).

[5] Richard Lehmann, president of the Bond Investors Association, recognized that "[t]his is something that will never be favorably ruled on at the state level . . . it does have to go to the Supreme Court." Thomas T. Vogel, *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, The Wall Street Journal, December 14, 1993 at C19 (Appendix G at 32a).

[6] *See Bonaparte v. Tax Court*, 104 U.S. 592 (1881).

[7] A Minnesota House legislative analyst stated that the bill was proposed to head off liability that might arise from this lawsuit in the Ohio courts. Cris Carmody, *Proposed Minnesota Bill Would Tax Interest From State, Local Bonds*, The Bond Buyer, March 22, 1995 at Page 1, Column 2 (Appendix I at 38a).

[8] But even those states present some form of discrimination. For example, Illinois also exempts certain specific Illinois issues by statutes unique to those bonds. 35 ILCS 5/203(a)(2)(A).

The states are thus obviously recognizing the impropriety of this practice. However, without direction from this Court, each state is constrained against legislatively or judicially dropping its discriminatory taxation to its competitive disadvantage as long as other states' discriminatory tax barriers remain in place.

c. *The issue is of tremendous importance to the operation of the nationwide market for municipal bonds.*

The financial journals have already noted the importance of the issue and the likely correctness of Petitioner's argument.[9] If petitioner prevails, *all* municipal bonds would become marketable nationwide, and all single-state bond funds would be immediately obsolete, or opened nationwide. Indeed the State legislatures are grappling with the issue, but each is similarly constrained against cutting off a discriminatory revenue source while others continue discriminating.

B. As Explicit Discrimination Against Commerce To Center Or Corner The Market For Municipal Bond Purchasers, The Discriminatory Tax Is Per Se Invalid And Lacks Any Saving Purpose Unrelated To Economic Protectionism.

As described in *Oregon Waste Systems Inc. v. Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994), a State statutory provision which discriminates *on its face* [10] against interstate commerce is subjected to a nearly *per se* rule of invalidity: No balancing is done. *Oregon Waste Systems Inc.*, 114 S.Ct. 1345 (1994). There is no need to prove the volume of commerce affected.

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[9] *See Articles*: Pierog, "Ohio's Tax on Out-of-State Bonds Spurs Suit That Worries Industry", *The Bond Buyer*, September 9, 1993 at Page 1, Column 3 (Appendix H at 34a); "Ohio Suit Threatens Tax Advantages of Buying Single-State Municipal Funds and In-State Bonds", *Wall Street Journal*, December 14, 1993 at C6 (Appendix G at 31a).

Wyoming v. Oklahoma, 502 U.S. 437, 112 S.Ct. 789 (1992).[11] The statute is viable only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988).[12]

Admittedly motivated solely by protectionist purposes to "center" or monopolize the Ohio bond market for Ohio municipal issuers, R.C. § 5747.01(A)(1) taxes the interest on government obligations based solely upon the out-of-state origin of those obligations. The provision thus discriminates *on its face* against items in commerce.[13]

Tax provisions do not obtain any special priority in Commerce Clause scrutiny. State tax provisions are subject to the same Commerce Clause limitations as other state regulations. The States' broad discretion to configure their taxation systems as they deem appropriate, has long been "bounded by any relevant limitations of the

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[10] Facially non-discriminatory provisions are instead reviewed under the so-called *Pike* test, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), upholding the regulation unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits.

[11] "Where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274.

[12] Invalidating Ohio's discriminatory sales tax on sales of ethanol, which exempted sales of ethanol produced from Ohio (or states which grant reciprocal tax exemption or benefits for Ohio-produced ethanol), holding that the "negative" or "dormant" aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Id.* at 273.

[13] As the trial Judge Stratton noted in the September 13, 1993 proceedings: "What other intent could be intended?" (Appendix F at 28a). Indeed, defendants' counsel Pratt acknowledged: "That is economic protectionism. That is the life blood of the sovereign itself. That is a government function." (Appendix F at 29a).

Federal Constitution, in this case the negative Commerce Clause." *Oregon Waste*, 114 S.Ct. at 1347.[14] Once viewed from a Privileges and Immunities perspective, this Court has consistently invalidated state tax discrimination against income received from other states. *Colgate v. Harvey*, 296 U.S. 404, 430ff (1935). More recently, that virtually per se rejection of discriminatorily taxing income from commerce has resided in the so-called "negative" or "dormant" Commerce Clause.

C. Differential Taxation Of Interstate Interest Has Been Addressed And Rejected By The Only Authorities Addressing The Issue.

The legality of differentially taxing interstate income has been definitively addressed and rejected in one reported case. In *Dominion National Bank v. Olsen*, 771 F.2d 108, 111 (6th Cir. 1985), the Sixth Circuit invalidated Tennessee's tax upon earnings from certificates of deposit issued by out-of-state financial institutions while exempting such earnings received from Tennessee banks. Following this Court's clear Commerce Clause lead, the Sixth Circuit held that the statute invalidly discriminated against commerce by "providing a direct commercial advantage" to Tennessee financial institutions over out-of-state financial institutions, by inducing Tennessee residents to invest in certificates of deposit

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[14] In *Boston Stock Exch. v. State Tax Comm.*, 429 U.S. 318 (1977), this Court invalidated a New York State transfer tax provision imposing a higher rate upon outside New York transfers of NYSE-listed shares whose "obvious effect" was to force the trading of New York-listed stocks to occur in New York. Because the discriminatory tax "foreclose[d] tax neutral decisions and create[d] both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister states," a unanimous Supreme Court struck the provision, concluding: "[t]his diversion of interstate commerce and diminution of free competition in securities sales are wholly inconsistent with the free trade purpose of the Commerce Clause." *Id.* at 335.

issued by in-state rather than out-of-state banks. *Id.* (quoting *Boston Stock Exchange*, 429 U.S. at 329).[15]

The State's admitted sole avowed purpose here—to "center" (corner) the market for Ohio public sector bonds in Ohio and those of other states in their own respective states—is pure economic protectionism. To erect barriers in the Ohio market against the entry of other states' bonds, and to encourage the other states to erect similar walls around their own resident investors, bespeaks a pernicious Balkanizing concept that is at odds with an efficient and effective national economy. *See also Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, supra* 114 S.Ct. 1345 (1994); *C & A Carbone, Inc. v. Clarkstown*, 114 S.Ct. 1677 (1994).

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[15] The Court also rejected *Dominion National Bank* defendants' argument to distinguish *Boston Stock Exchange* as a direct tax upon an interstate securities transfer transaction, from *Boston Stock Exchange's* tax upon local receipt of income derived from an interstate transaction. *Id.* at 118 (Contie, J., concurring). The court was not convinced. Relying primarily on *Maryland v. Louisiana*, 451 U.S. 725 (1981), the court indicated that "[i]n each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Dominion Nat'l. Bank*, 771 F.2d at 111 (quoting *Maryland v. Louisiana*, 451 U.S. at 756); *see also Id.* at 118 (Contie, J., concurring) ("[T]he fact that the challenged tax is assessed against receipt of income in Tennessee rather than against an interstate transaction . . . is irrelevant").

The Court also rejected, the *Dominion* defendants' argument that the tax differential was justifiable as a measure to compensate for Tennessee's inability to apply to out-of-state banks the Tennessee tax laws and banking regulations under which the Tennessee banks must operate. *Id.* at 111. The court was similarly unpersuaded, "[t]he common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce. . . . We find no such equality of treatment in our instant case." *Id.*, quoting *Maryland v. Louisiana*, 451 U.S. at 759.

D. The Invalidity Of Ohio R.C. 5747.01(A)(1) Is the Next Obvious Step In This Court's Eradication Of Balkanizing State Tax Provisions.

This Court has long rejected state efforts to Balkanize the nation by erecting barriers against the movement of goods across state lines. Early Commerce Clause cases invalidated state regulations on milk sales whose necessary effect was to protect state producers.[16] Recent Commerce Clause decisions, rejecting state arguments that garbage is not a protectable item of commerce, have routinely "trashed" state-erected taxes and other regulatory barriers to the "free flow" of garbage across state

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[16] *Baldwin v. Seelig, Inc.*, 294 U.S. 511 (1935), invalidated the New York Milk Control Act's prohibition of retail sales in New York of out-of-state milk, if the milk had been purchased at a lower price than the Act's minimum "set" price for sales by New York producers. *Id.* This Court held that the Act's operation unconstitutionally "set a barrier to traffic between one state and another as effective as if custom duties, equal to the price differential, had been laid upon the [goods]." *Id.* at 521, *Id.* at 499. This Court rejected New York's argument that its regulation was justified by the need to assure a regular and adequate supply of milk—that if farmers could not earn a living wage from producing milk, the resulting lack of milk supplies would endanger public health—since that rational would apply to *all* cases of state-enacted trade barriers to protect its own industry. *Id.* at 523, *Id.* at 500.

In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), this Court invalidated a Madison, Wisconsin ordinance prohibiting the sale of any milk as pasteurized unless it had been processed at a plant "within a radius of five miles from the central square of Madison." Similarly, this Court found that ordinance erected an economic barrier protecting a major local industry against competition from without the state, plainly discriminating against interstate commerce. *Id.* at 354, *Id.* at 298. Dispatching the city's argument that the regulation might have been motivated by bona fide safety and health concerns to enable easy inspection of pasteurization quality control to guard against the sale of adulterated milk, rather than a protectionist goal, this Court found the regulation nonetheless invalidly discriminated against interstat ecommerce. *Id.*

lines and have invalidated as impermissible protectionism discriminatory provisions.[17] In each case, this Court held that the local government's benign desire to either preserve its resources, generate revenues, or finance worthwhile projects could not be legitimately accomplished by constructing barriers to the free flow of interstate trade.

The timeliness of this issue is underscored by this Court's repeated expression of its continued appetite for Commerce Clause cases, its acceptance of uniform state taxes which do not discriminate against commerce, and its unyielding distaste for protectionist taxes. Upholding a sales tax imposed at a uniform rate upon the sale of bus tickets for travel, regardless of whether the trip is interstate or purely intrastate, Justice Souter spoke for

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[17] The Court thus invalidated provisions that: (a) prohibited the inflow of imported waste for disposal (*Philadelphia v. New Jersye*, 437 U.S. 617 (1978)); imposed higher dump tax rates (*Chemical Waste Management Inc. v. Hunt*, 504 U.S. 334 (1992)); or imposed more difficult permit requirements (*Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 504 U.S. 353 (1992)), on incoming "imported" toxic waste; or (b) conversely erected statutory "flow control" walls to prevent the *outflow* of garbage and capture its processing (and thus the incidental processing fees) to secure the financing for construction and acquisition of a municipal waste treatment plant. (*C & A Carbone, Inc. v. Clarkstown*, 114 S.Ct. 1677 (1994)). And although *Chemical Waste* reserved decision on whether a state might be permitted to impose a surcharge to reflect the actual cost differential in disposing of income toxic waste, *Id.*, this Court sealed that "opening" shut two terms later in *Oregon Waste Systems Inc. v. Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994). Justice Thomas' opinion for the 7-2 majority rejected Oregon's differential surcharge on incoming garbage as not a "compensatory" tax since the state could not show that it cost more to deal with imported garbage than to handle domestic garbage. Since the surcharge was discriminatory on its face, the virtually per se rule of invalidity provided the proper legal standard, and the provision was unsalvageable because the State could not meet its burden to show a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory alternatives. *Id.*

the Court of the Framers' view of an internally borderless nation:

> . . . We have understood this construction to serve the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation. *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, —— U.S. ——, 63 U.S.L.W. 4233, 4234 (decided April 3, 1995).

On April 17, 1995, this Court granted certiorari to review North Carolina's imposing its intangibles tax at a lower rate on stock issued by companies who do business within the state. *Fulton Corp. v. Justus*, 338 N.C. 472, 450 S.E.2d 728 (1994), *cert. granted sub nom. Fulton Corp. v. Faulkner*, 1995 WL 23498, 63 U.S.L.W. 3564 (April 17, 1995). The next day it heard argument over Oklahoma's refusal to grant federal remedies to persons who have successfully challenged state taxes which violate the Commerce Clause. *National Private Truck Council v. Oklahoma Tax Comm.*, 879 P.2d 137 (S.Ct. Okla. 1994), *cert. granted* 63 U.S.L.W. 3429; Schedule set 63 U.S.L.W. 3471.

E. The State Court's Creation Of A New "Sovereign Interest" Exemption To Commerce Clause Scrutiny Is Repugnant To This Court's View Of An Internally Borderless Nation.

The opinion below, created a "sovereign interest" exemption—that the Commerce Clause does not limit a

state or other sovereign acting in its *own* interest, even though it does prohibit discriminatory actions to favor local private interests—which does not exist and is repugnant to this Court's body of Commerce Clause decisions.

While much of the existing body of Commerce Clause decisions invalidate local tax provisions that were intended to benefit local *private* interests, the Court has never entertained nor anywhere implied the notion that a State may discriminate against commerce to prefer or favor its own interests. Presuming that a State is *always* acting for what it perceives as the public interest, Commerce Clause limitations on State activity may be viewed as having been imposed on a sovereign acting for its own public interest, or that of its citizens.

Indeed, in *C & A Carbone, Inc. v. Clarkstown*, 114 S.Ct. 1677 (1994), the Court squarely rejected the minority argument that the Commerce Clause should not preclude a state's use of its regulatory powers to benefit its own (as distinct from its private citizens') commercial interest. The local "flow control" ordinance at issue there prohibited the outflow of local garbage, requiring it to be processed at a local governmental facility, in order to ensure adequate "tipping fee" revenue to finance construction and the local government's acquisition of the waste facility for itself.

Nor did this Court overlook that issue, of whether a state may discriminate in favor of itself, as distinct from the prohibition against it doing so for local *private* interests. Justice Souter's minority dissent squarely argues that the discrimination should have been permitted, precisely *because* "the one favored facility is a governmental facility." *Carbone*, 114 S.Ct. 1677 (1994) (Souter, J., dissenting). The "sovereign" exemption was thus recognized but rejected.

There no reported decision (except the decision below) permitting a State to discriminatorily tax to benefit its

own direct "sovereign" or entity interests. Furthermore, the decisions are uniformly hostile to any exemption for any sovereigns, states or nations from the Commerce Clause.[18]

II. STATES, ESPECIALLY THOSE ALREADY AFFORDING JURISDICTION FOR DECLARATORY RELIEF AGAINST FACIALLY INVALID TAX PROVISIONS, ARE BOUND BY THE SUPREMACY CLAUSE AGAINST REFUSING TO EXERCISE THEIR JURISDICTION TO ENTERTAIN THOSE CLAIMS UNDER 42 U.S.C. § 1983.

The Supremacy Clause prohibits the state courts having already determined to exercise jurisdiction under state declaratory provisions, to refuse to entertain assertable federal causes of action in the State courts.[19] A very similar variant to this particular issue has been argued and is presently awaiting decision by this Court in *National Private Truck Council, Inc. v. Oklahoma Tax Commissioner*, No. 94-688, argued April 18, 1995.

State and Federal courts have concurrent jurisdiction over § 1983 cases, and the Supremacy Clause binds the state courts not to thwart the action by declining their jurisdiction. *Howlett v. Rose*, 496 U.S. 356 (1990).

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[18] In *United States v. California*, 297 U.S. 175 (1936), a state-operated railroad was fully subject to regulation by Congress acting within the Commerce Clause:

> "The State can no more deny the [Congress' plenary Commerce Clause] power if its exercise has been authorized by Congress than can an individual." 297 U.S. at 185.

(*See also Republic of Argentina v. Weltover*, 112 S.Ct. 2160 (1992) holding Argentina as a bond issuer to be subject to U.S. federal securities laws passed under the Commerce Clause).

[19] Indeed, the court's determination below, that Petitioner's right to have those claims adjudicated or to have the class certified must await a prior decision on whether they can prove entitlement to prevail on the merits—reverses the order prescribed by all federal and state court rules.

"The existence of the jurisdiction," a unanimous Supreme Court reminded, "creates an implication of duty to exercise it." *Howlett*, 496 U.S. at 369-370 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912)). And § 1983 may be used to assert Negative Commerce Clause claims. *Dennis v. Higgins*, 111 S.Ct. 865, 873 (1991). *Dennis* recognized both the right "to engage in interstate commerce free of discriminatory taxes," *id.* at 871 (quoting *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 320, n.3 (1977)), as well as the corollary right of " 'every consumer . . . to look to the free competition from every producing area in the Nation to protect him from exploitation by any." [20] *Hafer v. Melo*, 502 U.S. 21 (1991), itself rejected the notion that § 1983 is unavailable against state officials for claims which arise from actions taken in their official (as distinct from their private) capacity.

The issue is whether a State which already affords jurisdiction to its courts to hear declaratory challenges to a facially invalid tax statute, may nonetheless refuse to hear the federal claims against the tax statute. The trial court below based its rejection on an odd contortion of the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which precludes *federal courts* from exercising jurisdiction over challenges to State tax disputes. (Appendix at 17a). As *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) makes clear, the purpose of the provision is to

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[20] *Id.*, quoting *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949)); *see also Boston Stock Exch.*, 429 U.S. at 320, n.3 ("The Exchanges' complaint alleged that their members traded on their own accounts in securities subject to the [discriminatory] tax. The members therefore suffer an actual injury within the zone of interests protected by the Commerce Clause."); *Aronson v. Commonwealth*, 401 Mass. 244, 516 N.E.2d 137, 139 (1987) ("[A] plaintiff who alleges that she has been forced to pay an unconstitutional tax alleges an injury personal to her, and she has the right to test in court the questions of constitutionality and of injury").

curtail intrusion by the federal *courts*, leaving these challenges to be decided by the State courts. *Fair Assessment* makes clear that the statute does not license the state courts to decline their obligation to adjudicate federal claims.

The issue is certain to arise repeatedly in the future. As noted by this Court in the incredibly prolonged battle over whether the States must grant relief to federal retirees who were discriminatorily taxed on their pensions, while State retirees were exempt,[21] the State courts seem impossibly divided in their correct role on these matters as an independent judiciary or a rubber-stamp for the Tax Collector. The Tennessee Supreme Court's decision in *Bloomingdale's by Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992) *cert. denied*, 113 S.Ct. 3002 (1993), permitting § 1983 jurisdiction is obviously the correct view.[22] That is, where a state tax law *on its face* violates a federal constitutional provision, it will often be actionable under 42 U.S.C. § 1983.[23] That being so, a state may not deny to parties properly before it the use of its courts to a federal claim in the absence of a "valid excuse." *Howlett v. Rose*, 496 U.S. at 359.

And the whole *Davis/Harper/Reich* procession suggests that this Court needs to visit this issue because it is cer-

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[21] *See e.g. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993), and *Reich v. Marcus E. Collins*, 115 S.Ct. 547 (1994).

[22] The contrary view espoused in *State ex rel. Hanson v. Quill Corp.*, 500 N.W.2d 196 (N.D. 1993) and *L.L. Bean, Inc. v. Fred Bracey*, 817 S.W.2d 292 (Tenn. 1991) reflects the desire by two state courts, which already reject declaratory relief by their own taxpayers, to thwart § 1983 relief in order to prevent them from getting any relief at all. In *Quill*, the North Dakota Supreme Court procedurally thwarts a § 1983 state court action whose substance had been vindicated in the United States Supreme Court, displays merely a knee-jerk and unseemly reaction of many states to thwart the restitution which they rightly owe upon a determination that taxes were collected under an unconstitutional statute.

tain to recur in the future even if the petitioners prevail in *National Private Truck Council, Inc. v. Oklahoma Tax Commissioner*, No. 94-688,[24] since the states will then require a showing that the taxpayer has already prevailed on the declaratory or refund proceeding before being permitted to initiate a § 1983 action. History suggests that the states will thereafter assert that the claim is moot, and no longer a justiciable controversy, by the rendering of a favorable decision on the declaratory action. Certiorari is thus necessary to prevent the five year shell game that follows *Davis*.

And while the result of entertaining the federal claim means the state may have to pay fees to the successful challenger,[25] the State's desire to avoid any liability for fees [26] and eliminate their incentive ability to attract at-

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[23] Indeed the issue seems actually driven by either pin money fee avoidance or eliminating the litigation incentive (fees are often the only difference between states declaratory judgment statutes and § 1983). Congress' determination in § 1988, that a person's ability to obtain necessary counsel to assert § 1983 rights may require the incentive of attorney's fees is borne out in the context of this case. The balance is otherwise unfairly shifted to a State (willing to litigate fully against a threat to a revenue source, producing tens of millions of dollars annually) versus a taxpayer having to carry litigation of this sort over that taxpayer's State tax (rarely exceeding 10%) of a taxpayer's interest (itself now far less than 10% in the current economy) of even hundreds of thousands of dollars face value of bonds, would effectively eliminate all challenges in the absence of fees.

[24] Certiorari was granted on whether state courts may refuse to grant federal remedies under 42 U.S.C. §§ 1983 and 1988 to persons who have successfully challenged state taxes as violating their rights under the Commerce Clause of the United States Constitution.

[25] *See e.g. Dept. of Revenue v. Kuhnlein*, 636 So.2d 717 (Fla. 1994); *Rowan Companies, Inc. v. Louisiana State Tax Commission*, 623 So.2d 159 (La. 1993); *Radio Common Carriers of New York, Inc. v. State of New York*, 601 N.Y.S.2d 513 (1993).

[26] Held to an unenhanced lodestar by *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992), the fees are, in fact, but a minor amount contrasted with the results of the decision on the substantive issue.

torneys to file such cases is not a legitimate basis for the States' declining jurisdiction over the federal issue.

Indeed, the Supremacy Clause enforces Congress' view that fees *are* a necessary and desired incentive to induce attorneys to pursue these cases. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980). The State's primary argument below was that § 1983 claims should not be entertained *precisely* because it is fee-driven—that a State may decline to entertain a federal cause of action due solely to its desire to avoid incurring liability for its fees.

Nonetheless, the argument that there is any legitimate state interest in declining the federal cause of action has no bona fide support in States which, like Ohio, already grant state declaratory jurisdiction in such matters.[27]

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[27] *State ex rel. Tracy v. Franklin County Court of Common Pleas*, 66 Ohio State 3d 644, 614 N.E.2d 1047 (Ohio 1993) explicitly endorse Ohio state court's exercise of state law jurisdiction to adjudicate pre-deprivation challenges to the constitutionality of state tax provisions, and to enjoin the collection of those illegal taxes:

> "R.C.5753.01 grants courts of common pleas authority to enjoin an illegal levy or collection of taxes; . . . .
>
> The court further holds that if the common pleas court first determines that the tax enacted in R.C.5753.02 violates 3(C), Article XII of the Ohio Constitution, then the common pleas court has the authority to enjoin collection of the tax, subject to further review and the due course of law." (*Id.*)

Thus, the law of Ohio quite definitively supports both the plaintiff's standing and the trial court's authority to adjudicate this issue under all available grounds, implicitly including § 1983.

CONCLUSION

This case squarely presents two important issues upon which this Court's determination is needed: (1) the constitutionality of taxing the interest on out-of-state municipal bonds while exempting interest on in-state municipal bonds and (2) whether State courts already exercising jurisdiction over a facial challenge to a tax statute may nonetheless refuse to entertain the portion of the challenge asserting a federal cause of action.

Accordingly, the petition for writ of certiorari to the Ohio Appellate Court should be granted.

Respectfully submitted,

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